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No. 94-1463

In the Supreme Court of the United States

OCTOBER TERM, 1994

JESSE L. NIPPER, ET AL., PETITIONERS

v.

JIM SMITH, SECRETARY OF STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether, under Section 2 of the Voting Rights Act, a State's interest in maintaining at-large election districts for trial court judges precludes any remedy as a matter of law, without regard to the severity of the racial vote dilution shown by the evidence.

2. Whether a State's interest in maintaining existing at-large election districts for trial court judges is relevant at the liability stage of a lawsuit under Section 2, or only at the remedy stage, and, if relevant at the liability stage, what weight it should carry.

3. What the appropriate standards are for evaluating a Section 2 vote-dilution challenge to at-large election districts for state trial court judges.

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INTEREST OF THE UNITED STATES

This case involves the question whether plaintiffs who show that a State's at-large, numbered-post system of electing its trial court judges dilutes minority voting strength under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, have nonetheless failed to prove a violation of Section 2 unless they have also, as part of their prima facie case, identified a remedy "within the confines of the state's judicial model." See Pet. App. 77a. The Attorney General has primary responsibility for enforcing Section 2. See 42 U.S.C. 1973j(d).

This case will also affect the Attorney General's preclearance responsibilities under Section 5 of the

Voting Rights Act, 42 U.S.C. 1973c. Jurisdictions covered by Section 5 must submit changes affecting judicial elections to the Attorney General for preclearance. See *Clark* v. *Roemer*, 500 U.S. 646 (1991). The Procedures for the Administration of Section 5, 28 C.F.R. Pt. 51, expressly require the Attorney General to interpose an objection whenever necessary to prevent a clear violation of Section 2. See 28 C.F.R. 51.55(b)(2). The United States is currently defending four Section 5 declaratory judgment proceedings seeking preclearance of additional at-large judgeships.[1]

The United States filed briefs as amicus curiae in the court of appeals at both the panel and en banc stages of this case; we also participated in oral argument before the en banc court. The United States was a party in *Chisom* v. *Roemer*, 501 U.S. 380 (1991), which considered whether Section 2 applies to the election of judges, and the United States also participated as amicus curiae in *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 501 U.S. 419 (1991), which held that Section 2 applies to the election of state trial court judges.

STATEMENT

1. This case is a challenge to Florida's system for electing judges to both tiers of the state trial courts in two overlapping jurisdictions in the Jacksonville, Florida, area: the Fourth Judicial Circuit Court, which has 28 judgeships, and the Duval County Court, which has 12. Pet. App. 3a, 7a, 8a. Duval County, which encompasses

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[1] See *Georgia* v. *Reno*, No. 90-2065 (D.D.C. Feb. 3, 1995) (three-judge court) (notice of appeal filed Mar. 6, 1995); *New York* v. *United States*, No. 94-2219 (Dec. 22, 1994) (three-judge court) (finding no Section 5 violation), motion for reconsideration denied (D.D.C. Mar. 16, 1995); *Arizona* v. *Reno*, No. 94-2054 (D.D.C.) (three-judge court); *Texas* v. *United States*, No. 1:94-CV01529 (D.D.C.) (three-judge court).

Jacksonville, is one of three counties comprising the Fourth Judicial Circuit. *Id.* at 3a. Florida's circuit courts have general trial jurisdiction over civil and criminal matters; the jurisdiction of the county courts is restricted to misdemeanor and small claims cases assigned to those courts by statute. *Id.* at 7a.

Judges on the circuit and county courts are elected to six- and four-year terms, respectively. Pet. App. 7a; Fla. Const. Art. 5, § 10(b). Voting is at-large with numbered places and a majority vote requirement for election. Pet. App. 7a-8a. Thus, although each circuit or county judge has circuit-wide or county-wide venue responsibilities, and all voters within the circuit or county are eligible to vote in each of the circuit or county judgeship elections, the seats are filled by separate mini-elections. Pet. App. 7a-8a & n.4. Each candidate for a judgeship must select and contend for a particular numbered position within the multimember court and receive the majority of votes cast for that position. *Ibid.*

Although open seats on the two courts are filled by election, Fla. Const. Art. 5, §§ 10(b), 11(b), the Governor has authority to fill vacancies that occur between elections by choosing from a list of candidates prepared by a judicial nominating commission. Fla. Const. Art. 5, § 11(b); see Pet. App. 8a, 11a-13a. Approximately half of the judges who joined the Duval County and Fourth Judicial Circuit courts after the system was modified in 1976 to provide for mid-term appointments initially reached office by the appointment process.[2] Most judicial incumbents—including those initially appointed to office by the Governor—are unopposed for reelection. *Id.* at 20a, 87a.

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[2] At the time of trial, 17 of the 28 sitting Fourth Judicial Circuit Court judges had been appointed, as had five of the 12 sitting Duval County Court judges. Pet. App. 25c.

No black judge has ever won a contested judicial election in either the Fourth Judicial Circuit or Duval County. Since 1972, black candidates have run in contested elections for judgeships on the two courts a total of five times. Each time, the black candidate has lost in an election marked by racial bloc voting. Pet. App. 13a-19a. Before this lawsuit was filed, only one black judge had ever served on the Fourth Judicial Circuit Court and only one on the Duval County Court. *Id.* at 8a-9a. Both initially obtained their seats by appointment, and they, like most white incumbent judges, were not opposed for reelection. *Id.* at 16a, 20a. One additional black judge was appointed to the Duval County Court after this suit was filed. Pet. 2; Pet. App. 9a n.7.[3]

Blacks are significantly underrepresented on the Fourth Judicial Circuit Court when compared to the voting-age population in the jurisdiction as a whole. At the time of trial, the voting-age population of the Fourth Judicial Circuit was 19% black, but only one out of the 28 judges (or 3.5%) on the circuit court was black. Blacks are also underrepresented on the Duval County Court. Blacks constitute 22% of the voting-age population of Duval County, but only two out of the 12 judges (or 16%) on that county's court were black. Pet. App. 8a-9a.

Plaintiffs are black citizens living in the Fourth Judicial Circuit and Duval County, and a local organization of black attorneys. In 1990, they filed suit in the United States District Court for the Middle District of Florida to challenge the judicial election system in the

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[3] A fourth black judge was appointed—the second appointed to the Fourth Judicial Circuit Court—after the trial concluded, but that appointment was not made part of the district court record, was not considered by the courts below, Pet. App. 9a n.6, and is not considered here.

County and Circuit under Section 2 of the Voting Rights Act. On June 2, 1992, following a trial, the district court entered judgment in favor of the defendants. See Pet. App. 1c-54c. The court held that the plaintiffs had failed to demonstrate vote dilution in violation of Section 2. The court concluded that plaintiffs met the first precondition required by *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), because they "demonstrated that blacks are a sufficiently large and geographically compact group to constitute a majority in a subdistrict." Pet. App. 28c. The court found no racially polarized voting, *id.* at 28c-36c, however, and held that, even if racial polarization were shown, the defendants rebutted that showing by demonstrating that the electorate was not "driven by racial bias," *id.* at 36c. Because the court found no liability, it did not reach the question of remedy.

2. A panel of the Eleventh Circuit reversed and remanded for the imposition of a remedy. Pet. App. 1b-26b. The full court, however, voted to rehear the case en banc, *Nipper* v. *Smith*, 17 F.3d 1352 (1994). The en banc court of appeals affirmed the district court by a 6-2 vote, with three judges recused. Pet. App. 1a-142a.

a. Except with respect to Parts III(A) and III(B)(1) of the opinion written by Chief Judge Tjoflat, see pp. 6-7, *infra*, there was no majority opinion. Writing for himself and Judge Anderson, Chief Judge Tjoflat concluded that the district court had erred in finding no vote dilution. In his view, the Section 2 results test requires plaintiffs to show "that a voting community is driven by racial bias and that the challenged electoral scheme allows that bias to dilute the minority population's voting strength." Pet. App. 63a. He found that plaintiffs had met that test. *Id.* at 90a-102a. Judge Hatchett, dissenting, joined by Judge Kravitch, agreed that vote dilution had occurred, *id.* at 114a-132a, although he rejected Chief Judge Tjoflat's

requirement that plaintiffs show racial bias in the voting community. In his view, they need only show that the challenged system "operate[s] to disparately impact the ability of minority voters to elect their preferred candidates on account of race." *Id.* at 116a. The remaining four judges participating in the en banc decision assumed without deciding that dilution could be shown. *Id.* at 113a.

b. A majority of the court of appeals nonetheless held that respondents were not liable. They concluded that the State's interest in maintaining its electoral system in its present form prevented any finding of a Section 2 violation despite the existence of vote dilution.

In the portions of Chief Judge Tjoflat's opinion in which six judges joined (Parts III(A) and III(B)(1)), the court held that the traditional *Gingles* vote-dilution inquiry should be altered in challenges to judicial elections. Pet. App. 70a-82a. This Court in *Chisom* v. *Roemer*, 501 U.S. 380 (1991), and *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 501 U.S. 419 (1991), held that vote-dilution claims involving judicial elections are covered by Section 2, but did not set forth the standards to be applied in such cases. The court of appeals formulated a Section 2 rule under which the plaintiff must identify a feasible remedy as "part of the plaintiff 's prima facie case." Pet. App. 76a. That remedy must, in addition, be "within the state's judicial model." *Id.* at 78a.

The court arrived at that standard by reading the first of the three preconditions set forth in *Gingles* to require the district court to determine "whether it can fashion a permissible remedy in the particular context of the challenged system." Pet. App. 76a. In *Gingles* itself, a showing of a sufficiently large and geographically compact legislative subdistrict satisfied the first of the three *Gingles* preconditions. The court held, however, that such a showing was inadequate to satisfy the first *Gingles*

precondition in a challenge to *judicial* elections. *Id.* at 78a. Rather, "[i]n judicial cases, * * * single-member districts may run counter to the state's judicial model." *Ibid.* Plaintiffs thus must prove that, "within the state's judicial model, there exists an alternative election scheme that could serve as an appropriate section 2 remedy." *Ibid.*

In reaching that conclusion, the court relied heavily on the statement in *Holder* v. *Hall*, 114 S. Ct. 2581 (1994), that a court considering a vote-dilution challenge "must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." Pet. App. 79a. If no "objective and workable standard for choosing a reasonable benchmark" exists, the court reasoned, "it follows that the voting practice cannot be challenged as dilutive under § 2." *Id.* at 81a-82a (quoting *Holder*, 114 S. Ct. at 2586 (plurality opinion)). Plaintiffs thus could not prove a Section 2 violation unless they could identify a remedy that retained the State's "judicial model."

c. In two separate opinions, a total of six judges then concluded that none of the remedies suggested by the plaintiffs could be adopted while maintaining the State's current "judicial model."[4] See Pet. App. 103a-112a; *id.* at 113a.

Chief Judge Tjoflat, in a portion of his opinion joined only by Judge Anderson, considered and rejected three alternative potential remedies. He first rejected subdistricting. Plaintiffs had introduced evidence that a compact subdistrict, with a 60% black voting-age population, could be drawn in northwestern Duval County, and that the subdistrict's population would enable it to elect six out of the 28 circuit judges and three out of the 12 county court judges. *Id.* at 13c; *id.* at 104a & n.91. In Chief

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[4] As noted above, the question of remedy was not litigated in the district court.

Judge Tjoflat's view, however, "the State's interest in linking the jurisdictional and electoral bases of its circuit and county court judges" played "a major role" in consideration of whether an appropriate remedy could be fashioned. *Id.* at 103a. Chief Judge Tjoflat concluded that, by removing linkage, the subdistricting remedy would impermissibly alter the State's chosen balance between accountability and independence. *Id.* at 103a-108a.

Chief Judge Tjoflat next rejected the remedy of dividing the current Fourth Judicial Circuit into two or more smaller circuits. Pet. App. 108a-109a.[5] He acknowledged that such a remedy would preserve the system's current linkage, and that the new circuits could each have a larger population than at least one other existing circuit. *Id.* at 108a. Nevertheless, he concluded that dividing the circuit would be impractical because it would require a change in the State's venue rules (which are currently based on county lines) and it would alter the composition of jury pools. *Id.* at 108a-109a.

Finally, Chief Judge Tjoflat rejected the remedy of electing judges in the current districts by cumulative voting, without subdistricting. "Although cumulative voting would preserve linkage and avoid many of the concerns accompanying a subdistricting plan," he concluded that the drawbacks of such a remedy outweighed its benefits. Pet. App. 109a-110a. A cumulative voting scheme would require the State to abandon its numbered-post system. *Id.* at 110a. Eliminating numbered posts might, in turn, inject into incumbent judges' reelection campaigns an element of competition among them, and

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[5] Chief Judge Tjoflat did not address whether subdistricting for Duval County Court elections would be feasible because he believed that the Florida Constitution requires county courts to follow county lines. Pet. App. 108a n.92; see Fla. Const. Art. 5, § 6(a).

would thus "have a detrimental effect on the collegiality of the court's judges in administrative matters," and deter lawyers from seeking a judicial career. *Ibid.*

d. Judge Edmondson, in an opinion joined by Judges Cox, Birch, and Dubina, concurred in Chief Judge Tjoflat's opinion in part, and concurred in the result. Pet. App. 113a. Judge Edmondson joined in the portions of Chief Judge Tjoflat's opinion in which he discussed the requirement that plaintiffs show, as part of the first *Gingles* threshold factor, a remedy "within the state's judicial model." *Id.* at 78a; see *id.* at 70a-82a (Parts III(A) and III(B)(1)). Judge Edmondson agreed "that each of the remedies discussed is precluded given the State's interest in and right to formulate its own judicial system." *Id.* at 113a.

e. Judge Hatchett, joined by Judge Kravitch, dissented. Pet. App. 114a-142a. They took issue with the majority for relying "almost entirely upon speculation and conjecture to support its holding that Florida's interest in conserving its current at-large voting system precludes any possible remedy the appellants or the district court can devise." *Id.* at 133a. In their view, the district court should have an opportunity to hear evidence on possible remedies and to make its own remedial determination in the first instance. *Ibid.* The dissent also challenged Chief Judge Tjoflat's bases for rejecting the three potential remedies considered by the Chief Judge. *Id.* at 135a-140a.

ARGUMENT

This case presents the question whether vote-dilution challenges to at-large judicial election systems are precluded wherever a remedy would require a change to some aspect of the State's "judicial model." The Eleventh Circuit held that, in such circumstances, no violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, can be

found. This Court should grant certiorari to establish that Section 2 can provide a remedy for vote dilution caused by an at-large system of electing judges even where the remedy might require some structural change in the at-large system. Although the State's interest in maintaining the challenged system should be considered as part of the analysis under Section 2, that interest should not be given preclusive effect. The en banc court's holding to the contrary conflicts with *Houston Lawyers Ass'n* v. *Attorney General of Texas*, 501 U.S. 419, 427 (1991), and seriously misconstrues *Holder* v. *Hall*, 114 S. Ct. 2581 (1994). The holding also will have a broad impact upon the ability of the United States to fulfill its enforcement obligations under Section 2 and Section 5, and thus warrants this Court's review.

1. The decision below severely restricts Section 2's effectiveness to ensure that, where States elect judges, the election systems are nondiscriminatory. The system in use in the jurisdictions involved in this case is currently employed by each of Florida's 20 judicial circuits and 67 counties. See generally Fla. Const. Art. 5, §§ 5, 6, 10(b), 11(b); Fla. Stat. Ann. § 34.022 (West Supp. 1995). Other States also use, either locally or on a state-wide basis, potentially dilutive at-large judicial election systems. Under the Eleventh Circuit's holding, all those systems apparently would be insulated from meaningful review under Section 2, no matter how serious their dilutive effect on minority voting rights. Section 2 challenges to systems for electing state judges are currently pending in eight States (including the three States that comprise the Eleventh Circuit).[6]

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[6] See *Cousin* v. *McWherter*, 46 F.3d 568 (6th Cir. 1995); *Brooks* v. *State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994); *Bradley* v. *Indiana State Election Bd.*, 797 F. Supp. 694 (S.D. Ind. 1992); *Southern*

2. a. The Eleventh Circuit's holding is in clear conflict with *Houston Lawyers' Ass'n*, *supra*. In that case, the State of Texas argued that its "linkage" interest in maintaining an at-large, jurisdiction-wide system of electing trial judges precluded any finding of a Section 2 violation. The Court rejected that argument. It specifically disagreed that trial judges were "automatically exempt[]" from the coverage of Section 2. 501 U.S. at 426. It held that "the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices," although legitimate, "does not automatically, and in every case, outweigh proof of racial vote dilution." *Id.* at 427.

Notwithstanding *Houston Lawyers' Ass'n*, the Eleventh Circuit's ruling creates a virtually automatic exemption from Section 2 for dilutive at-large judicial election systems. The court of appeals thus erroneously held that plaintiffs challenging such an election system under Section 2 must identify, as part of their prima facie case, a remedy "within the state's judicial model":

> In judicial cases, * * * single-member districts may run counter to the state's judicial model. Thus, the question under the first *Gingles* threshold factor may not be whether the minority group could constitute a majority in a single-member district, but whether, within the state's judicial model, there exists an

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Christian Leadership Conference v. *Evans*, 785 F. Supp. 1469 (M.D. Ala. 1992), vacated, 18 F.3d 897 (1994), rehearing en banc granted, No. 92-6257 (11th Cir. Mar. 23, 1994); *Davis* v. *Chiles*, No. 90-40098-MP (N.D. Fla. Sept. 3, 1992); *De Yurre* v. *Chiles*, No. 94-1527 CIV KEHOE (S.D. Fla.); *Milwaukee Branch of the NAACP* v. *Thompson*, No. 94-C1245 (E.D. Wis.); *Trujillo* v. *California*, No. C-92-20465 RMW (N.D. Cal.); *Del Torro* v. *Cuomo*, No. 92-7739 (S.D.N.Y.); *Frances* v. *Cuomo*, No. 92-1144 (S.D.N.Y.).

> alternative election scheme that could serve as an appropriate section 2 remedy.

Pet. App. 78a.[7] It then applied that requirement in a manner that precludes Section 2 challenges to dilutive at-large judicial election systems, without regard to the severity of the discrimination caused by the State's system, wherever a remedy would require modification of that model. Under the court's holding, a plaintiff's failure to prove that vote dilution can be resolved "within the state's judicial model" automatically terminates the case regardless of the extent to which the State's "judicial model" dilutes minority voting strength, and regardless of the sorts of changes in the judicial model that would be required in order to remedy the dilution.[8]

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[7] The court cited *Houston Lawyers' Ass'n* for this proposition. The Court in *Houston Lawyers' Ass'n* commented that, "[e]ven if we assume, *arguendo*, that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts," that interest "does not justify excluding elections for single-member offices from the *coverage* of the § 2 results test." 501 U.S. at 426. Rather, the Court suggested that "such a state interest is a factor to be considered by the court in evaluating *whether the evidence in a particular case* supports a finding of a vote dilution *violation* in an election for single-member office." *Ibid.* (emphasis added in part). The Court's statement properly emphasizes that voting rights violations and remedies must be determined in case-by-case, fact-specific adjudication, and correctly suggests that the State must offer proof of its own interests. The court of appeals, however, erroneously gave the "State's interests"—including some interests never even asserted by the State—preclusive effect as a matter of law, without conducting such an analysis.

[8] The other two circuits to have considered the question have, in contrast, explicitly recognized that even a substantial state interest in maintaining a "linkage" system "will not always defeat § 2 liability." *League of United Latin American Citizens* v. *Clements* (*LULAC*), 999 F.2d 831, 876 (5th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 878 (1994); accord *Cousin* v. *McWherter*, 46 F.3d 568, 577 (6th Cir. 1995). Unlike

b. In reaching its decision, the Eleventh Circuit incorrectly relied on *Holder* v. *Hall*, 114 S. Ct. 2581 (1994). The Court in *Holder* concluded, in the context of a challenge to a single-member county commission, that Section 2 does not encompass vote-dilution challenges to the size of government bodies. See *id.* at 2588 (plurality opinion); *id.* at 2589-2591 (O'Connor, J., concurring in part); *id.* at 2591 (Thomas, J., concurring in the judgment). The plaintiffs in *Holder* suggested that a multimember rather than a single-member commission was a feasible remedy that would allow minority voters to elect one or more commissioners of their choice. The plurality found that the degree of potential vote dilution caused by the single-member commission could not be assessed without an objective "benchmark" number of commissioners against which to measure the single-member commission. The plurality in *Holder* could find no principled reason to choose any particular size commission over any other: "Once a court accepts respondents' reasoning," advocating that the single-member commission be expanded to include more than one commissioner in order to create smaller electoral subdistricts, "it will have to allow a plaintiff group insufficiently large or geographically compact to form a majority in one of five districts to argue that the jurisdiction's failure to establish a 10-, 15-, or

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the Eleventh Circuit, which now puts plaintiffs to the burden of demonstrating the existence of a remedy "within the state's judicial model" as a threshold requirement, the Fifth Circuit in *LULAC* and the Sixth Circuit in *Cousin* both held that the state interests reflected in the current electoral system must be weighed against the plaintiffs' showing of dilution; sufficiently strong evidence of dilution could outweigh even a significant state interest in the current system. See *Cousin*, 46 F.3d at 577; *LULAC*, 999 F.2d at 876 (holding that proof of "substantial" dilution can outweigh State's interest in "linkage"). The decision below conflicts with those decisions.

25-commissioner structure is dilutive." *Id.* at 2590 (O'Connor, J., concurring in part). Because "[t]he wide range of possibilities makes the choice inherently standardless," *id.* at 2588 (plurality opinion) (internal quotation marks omitted), the Court found it impossible to determine whether a government body's size dilutes minority voting strength.

The Eleventh Circuit did not rely on *Holder* to find an absence of vote dilution;[9] rather, the court found dilution, but drew from *Holder* the much broader conclusion that federal courts cannot impose under the Voting Rights Act any remedy that would "alter the state's form of government itself when they cannot identify 'a principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.' " Pet. App. 80a-81a (quoting *Holder*, 114 S. Ct. at 2586). In the court's view, *Holder* thus requires that plaintiffs show "the existence of a workable remedy within the confines of the state's system of government," Pet. App. 81a—or, where election of judges is concerned, within the State's "judicial model," *id.* at 78a. The absence

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[9] *Holder* could not have been applied here to defeat the finding of vote dilution because this is among those cases in which, as the *Holder* court noted, the benchmark voting practices are "obvious," 114 S. Ct. at 2586 (plurality opinion), or "self-evident," *id.* at 2589 (O'Connor, J., concurring in part) (noting that, "[i]n a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-member districts"); see also *Thornburg* v. *Gingles*, 478 U.S. 30, 38, 50 & n.17 (1986). It was only because the plaintiffs in *Holder* claimed that the size of the governmental body was the dilutive practice that the plurality could find no principled reason to choose any particular benchmark over any other. Here, the size of the circuit and county courts would remain the same under each of the alternative remedies.

of such a remedy, the court held, forecloses liability as a matter of law. *Id.* at 81a-82a, 113a.

The Eleventh Circuit's unwarranted expansion of *Holder* misconceives the appropriate role of the State's interest under Section 2. It has long been the rule that, where vote dilution exists, some alteration in the State's election system may be called for in order to remedy the violation. To be sure, a remedy for a voting rights violation must not "intrude upon state policy any more than necessary." *Whitcomb* v. *Chavis*, 403 U.S. 124, 160 (1971); see also *Upham* v. *Seamon*, 456 U.S. 37, 42-43 (1982) (per curiam); *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973). This Court has therefore recognized that a State should be given the first opportunity to propose a remedial plan, and a district court's modifications of such a plan should be "limited to those necessary to cure any constitutional or statutory defect." *Upham*, 456 U.S. at 43 (per curiam). Nonetheless, a finding of minority vote dilution under Section 2 ordinarily requires a remedy.[10] Neither the existence of several remedial options nor the fact that an adequate remedy may require some alteration of the State's system properly forecloses relief. Thus, while the State's interest in retaining its existing "judicial model" might appropriately be considered at the remedial stage of the case—or perhaps weighed as part of a court's evaluation of the "totality of the circumstances" in determining whether dilution has occurred—neither *Holder* nor any other authority justifies the Eleventh Circuit's decision entirely preventing courts from even

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[10] See S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982) ("The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.").

considering evidence of vote dilution unless the plaintiff proffers a remedy that requires no changes in the State's "judicial model."

c. The manner in which the Eleventh Circuit applied its "judicial model" rule in this case illustrates the essentially conclusive deference that the rule improperly accords to States' asserted interests in maintaining their particular judicial models.

The district court heard very little evidence on the State's interests in preserving the various relevant aspects of Florida's current judicial model.[11] That court made no factual findings regarding those interests, nor did it weigh them among the "totality of the circumstances" in evaluating plaintiffs' vote-dilution claim. The district court also did not consider any remedial questions. After reversing the district court's holding that no vote dilution occurred, the court of appeals did not remand to allow the district court to consider the nature and strength of the State's interests in the particular circumstances of this case. See Pet. App. 103a & n.90, 112a, 113a. Instead, the Eleventh Circuit employed a kind of minimum-level rational basis scrutiny, permitting judicially identified post-hoc rationalizations to override a demonstration of dilution of minority voting rights. Cf. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). The court of appeals

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[11] The only evidence the State presented to support its linkage interest and justify the at-large election of judges was the conclusory testimony of two witnesses. Fourth Judicial Circuit Chief Judge Santora testified that electing judges from small subdistricts would affect judicial impartiality. Tr. 195-196 (Dec. 16, 1991). Another Fourth Judicial Circuit judge testified that he favors the current at-large system because he does not think of himself as a representative with a "constituency." *Id.* at 129-131. That testimony falls far short of establishing that the current system is necessary to promote judicial independence.

conducted no meaningful factual scrutiny of the strength of Florida's asserted interests, the consistency with which the State seeks to advance those interests, or the necessity of maintaining every aspect of the current electoral system in order to vindicate them. That approach is entirely inconsistent with the sensitive contextual, fact-specific inquiry that this Court requires in assessments of vote-dilution claims under Section 2. See *Gingles*, 478 U.S. at 45, 79.

Florida here asserted only one interest in support of the current at-large system of judicial elections—an interest in "linkage." See Pet. App. 101a. The State claimed that it had a strong interest in maintaining a perfect "link" between an elected trial judge's "jurisdiction" and his or her elective base, because "linkage" assertedly balances the accountability and independence of elected judges by ensuring that they are answerable to all the voters within the elected judge's area of primary venue responsibility and by preventing them from being beholden only to narrow factions within that area. *Ibid.* Because a sub-districting remedy would disrupt that "linkage," the court concluded that it was categorically impermissible.

Chief Judge Tjoflat did not consider the evidence before the district court demonstrating that Florida has neither consistently sought to advance the interests that linkage purportedly serves, nor even strictly maintained linkage. The undisputed testimony from both sides, for example, was that judges under the current system frequently decide cases involving litigants from outside their electoral base, and that judges take great pride in treating all litigants fairly. Tr. 129-131, 198-200 (Dec. 16, 1991); Tr. 6-11 (Dec. 18, 1991). The current system also permits judges elected in one jurisdiction to preside over cases in another. Fla. Stat. Ann. § 26.57 (West 1988).

Chief Judge Tjoflat also improperly rejected the possibility that a vote-dilution remedy could wholly or partly preserve existing forms of linkage. The plaintiffs had proposed, as an alternative to their subdistricting remedy, that the current Fourth Judicial Circuit could be divided into two or more smaller circuits. As Chief Judge Tjoflat acknowledged, within each of those circuits, linkage would be maintained. Nevertheless, he rejected that alternative by identifying interests which the State itself had not—*e.g.*, that creating new districts would "require a modification of Florida's [county-based] venue rules" and would "alter the composition of the courts' jury pools," Pet. App. 108a-109a, and that departing from the numbered-post rule would force sitting judges to stand for reelection against one another, *id.* at 110a. However, the district court heard no evidence or argument regarding why the numbered-post rule is necessary, why a satisfactory modification of existing venue rules could not be made, nor why jury pools could not either remain as they are or fairly be constituted in some alternative manner.[12]

The Eleventh Circuit's "judicial model" rule thus effectively recognizes a state interest, sufficiently strong to preclude liability altogether, in nearly every facet of a State's trial court system. Under the circuit's rule, for example, "judicial model" status might be accorded to exceptionally large electoral districts (based on the rationale that large district size promoted judicial independence) or to majority or super-majority vote requirements (based on the rationale that such requirements would ensure that judicial power is given

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[12] Florida law appears to grant considerable latitude to the chief judge to determine the boundaries of jury districts. See Fla. Stat. Ann. § 40.015 (West 1988).

only to those who command support from a broad cross-section of the community). Yet those are some of the very practices Congress targeted in enacting the amended Section 2. See *Gingles*, 478 U.S. at 45. A proper application of Section 2 of the Voting Rights Act requires that, once dilution is found, a serious effort be made to craft an appropriate remedy. Such an effort does not permit automatic deference to all aspects of the State's "judicial model." Rather, the State should be given an opportunity to propose an adequate remedy, which the court may alter insofar as may be necessary to cure the dilution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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